No. 08-753

Supreme Court, U.S.
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In The
Supreme Court of the United States

OCEAN HARBOR HOUSE
HOMEOWNERS ASSOCIATION,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

On Writ Of Certiorari To The California Court Of Appeal, Sixth Appellate District

BRIEF IN OPPOSITION

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QUESTION PRESENTED

When proposed development will destroy one acre of public beach and interrupt a two-mile stretch of continuous sandy beach, does an in-lieu mitigation fee for the project meet the rough proportionality requirement of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), where the agency imposing the fee uses an established economic method to quantify the lost recreational value to the public that will result from loss of the beach and imposes a fee equal to that loss to be used for replacement public recreational opportunities?

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V 5

STATEMENT

1. The California Coastal Commission (Commission) imposed the mitigation fee at issue in this case as a condition of a permit for construction of a protective seawall in front of petitioner Ocean Harbor House Homeowners Association's (petitioner) Monterey, California condominium complex. Pet. App. A-12. There is no dispute that the seawall will destroy one acre of public beach in front of the complex, and interrupt a two-mile stretch of continuous sandy beach in and adjacent to the City of Monterey. *Id.* at A-13.

Consistent with California Coastal Act requirements to maximize public recreational opportunities on the coast, the Commission required petitioner to pay an in-lieu mitigation fee to compensate for the loss of public recreational opportunities at the beach that will be lost because of the seawall. Pet. App. A-15. The Commission set the mitigation fee at $5.3 million payable over the 50 year life of the seawall, which would be $2.1 million if it is paid within five years. *Id.* at A-20-21. The Commission directed that the fee be used for purchase of beach front or dune property for public recreational use in the southern Monterey Bay area. *Id.* at A-15; AR 13:2241.

The Commission calculated the mitigation fee using a method known as the economic recreational value method. Pet. App. A-16-18. The method entails determining the monetary value that users of a natural resource place on its use and multiplying that

value by the number of users of the resource to determine the economic value of the resource. *Ibid.* The administrative record contains numerous economic studies supporting use of the method as a valid tool to attach a monetary value to a natural resource. *Ibid.* The record also contains the expert opinion of an environmental science and engineering professor at UCLA who has published widely in the field of beach valuation, confirming that the Commission used an appropriate figure for the recreational value of the Monterey beach. Pet. App. A-42-43.

The Commission's staff report, provided to petitioner before the Commission's permit hearing, contains a full description of the economic recreational value method and its application to the facts in this case. Pet. App. A-19; AR 4:736-740. The staff report also discusses other possible methods for calculation of a mitigation fee to compensate for loss of the public beach. *Ibid.* Although petitioner's Board of Directors and its legal counsel had an opportunity to review the staff report at length before the permit hearing, at the hearing petitioner did not challenge use of the economic recreational value method, nor did petitioner challenge any of the facts cited in the staff report as the basis for calculation of the $5.3 million fee. AR 11:1817. Instead, petitioner argued that any in-lieu fee for purchase of other recreational property would violate the nexus and rough proportionality requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)

and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). AR 11:1979-1980.

2. Following the Commission's decision to approve the seawall permit with the $5.3 million mitigation fee (reduced to a present value of $2.1 million), petitioner filed a petition for a writ of administrative mandamus in the Monterey County Superior Court. Pet. App. A-24. Among other claims in the mandate action, petitioner disputed the method used to calculate the fee and urged that the fee violates the nexus and rough proportionality requirements of *Nollan* and *Dolan*. *Ibid.* The superior court found that petitioner failed to exhaust its administrative remedies on several arguments raised in the mandate action, including the challenge to the method used to calculate the mitigation fee. Pet. App. B-9. The superior court considered petitioner's nexus and rough proportionality arguments, and concluded that the administrative record supports the Commission's determination that the fee imposed has a nexus to and is roughly proportional to the impact of the seawall. *Id.* at B-10, 11, 12. After entry of judgment in the Commission's favor by the superior court, petitioner filed a timely appeal in the California Court of Appeal. *Id.* at A-12.

3. The Court of Appeal affirmed the superior court judgment. Pet. App. at A-13. The Court of Appeal considered petitioner's argument that the fee is not roughly proportional to the impact of the seawall, and "looked behind the arithmetic" to "evaluate how the Commission analyzed the loss and measured

it." Pet. App. A-38. The court concluded that in order to determine whether the fee is roughly proportional to the impact of the seawall it had to evaluate both the nature of the impact of the seawall and the way its dollar value was measured. *Ibid.* Based on its detailed review of the record, the Court of Appeal concluded that "although the Commission was not required to make a precise mathematical calculation, show an exacting correspondence between fee and loss of recreational value, or demonstrate that the fee was directly proportional to the loss, that is what it did." Pet. App. A-43-44.

4. Petitioner sought review of the Court of Appeal's decision in the California Supreme Court. The California Supreme Court denied review. Pet. App. C-1.

ARGUMENT

Petitioner asserts that there is widespread confusion regarding application of *Dolan's* rough proportionality standard. Pet. App. A-10. The petition does not support this assertion and instead relies only on the unique facts of this case as a basis for review. The narrow and fact-bound question of whether the lower courts properly applied *Dolan* in this particular case is not an important federal question and does not warrant this Court's review.

Even assuming petitioner had presented an important question for review regarding the rough proportionality standard, this case is a poor vehicle

for review. As the trial court determined, and as noted in the Court of Appeal's opinion, petitioner did not challenge the method used to calculate the mitigation fee or dispute any of the facts on which the Commission relied to calculate the fee before the Commission made its permit decision. The record therefore lacks evidentiary support for the arguments petitioner now raises that the fee is not roughly proportional to the public impact of the seawall. This case is also a poor vehicle for review because the question presented by petitioner is based on misstatements of the facts of the case. The petition should be denied.

I. The Petition Does Not Present An Important Federal Question.

The Fifth Amendment of the United States Constitution prohibits government from taking private property for public use without just compensation. This Court's extensive takings jurisprudence includes the decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), in which the Court held that to avoid a Fifth Amendment taking claim, a land dedication requirement in a development permit must be "roughly proportional" to the impact of the development on public interests.

In adopting the rough proportionality standard, the Court reviewed state court decisions involving land dedication requirements. The Court rejected as "too lax" rules adopted in some states that required only a generalized statement of connection between

the proposed development and the land dedication. *Dolan, supra*, 512 U.S. at p. 389. The Court also rejected rules adopted in other states that required an "exacting correspondence" between the proposed dedication and the need created by the development. *Id.* at p. 390.

The Court ultimately adopted an intermediate approach favored by most states requiring "rough proportionality" between a land dedication requirement and the public impact of development. The Court stated that "no precise mathematical calculation is required" and that a government agency imposing a land dedication requirement as a condition of development "must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[1] *Dolan, supra*, 512 U.S. at p. 390-91.

Although petitioner is seeking review to "resolve confusion regarding how to apply the rough proportionality standard," the petition does not show that confusion warranting review actually exists. The one

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[1] Because *Dolan* concerned a land exaction, it is questionable whether the rough proportionality requirement applies as a matter of federal constitutional law to the mitigation fee at issue in this case. If *Dolan* is limited to land exactions, then the Court of Appeal's rough proportionality analysis raises, at most, a question of state law: how a mitigation fee condition should be reviewed under California state law, including the California Constitution.

case the petition discusses, *B.A.M. Development, L.L.C. v. Salt Lake County*, 196 P.3d 601, 2008 Lexis 158 (Utah, Oct. 24, 2008), characterizes the legal concept addressed in the case, whether a land dedication requirement for a residential development permit meets the rough proportionality standard, as "easily defined." *Id.* at p. 602. The decision advocates use of the term "rough equivalence" rather than "rough proportionality," but does not otherwise deviate from application of this Court's reasoning in *Dolan*; nor does the decision suggest widespread confusion regarding application of the rough proportionality requirement.

The only other support petitioner offers for confusion in application of the rough proportionality standard is a series of citations to statements by legal commentators. None are on point. One characterizes this Court's takings jurisprudence in general as "downright incoherent." Pet. App. A-10. Two others, published immediately after the *Dolan* decision, say that the meaning of the decision will have to be "fleshed out in future decisions." *Id.* at A-11 and A-18. Another is cited for the unremarkable proposition that application of constitutional tests, such as the rough proportionality requirement, can be difficult in the real world. *Id.* at A-11. None of these comments support that there is sufficient confusion about application of the rough proportionality standard to require this Court's review.

The petition's failure to raise an important federal question is highlighted by the question presented for review, which does not ask the Court to refine the rule announced in *Dolan* or suggest any particular refinement of the rule. Instead, the question presented is a request that the Court grant review to determine whether *Dolan* was properly applied to the unique facts in this case. This exceedingly fact-specific question is not one that this Court need answer.

II. This Case Is A Poor Vehicle For Review Of The Rough Proportionality Standard.

Even assuming that the petition did present an important federal question regarding application of the rough proportionality standard, this case is a poor vehicle for review. Petitioner's sole argument against the mitigation fee at the administrative level was that any mitigation fee imposed for purchase of other property, no matter the amount or method for calculation of the fee, would violate the nexus and rough proportionality requirements of *Nollan* and *Dolan*. AR 11:979-1980. Petitioner has abandoned this untenable theory (most likely because *Dolan* explicitly acknowledges that a requirement for purchase of replacement property meets constitutional standards) and now directs its arguments to the particular method used to calculate the mitigation fee. However, the record does not contain any support for petitioner's post-hearing arguments criticizing the method used for calculation of the fee. As an example,

petitioner criticizes the Commission's reference to recreational values of Southern California beaches to determine the recreational value of the Monterey beach that will be lost as a result of the seawall. Pet. App. A-13-14. But petitioner did not provide any evidence at the Commission's hearing indicating that the recreational value of other California beaches is irrelevant in determining the recreational value of the Monterey beach. Similarly, petitioner did not offer any evidence at the permit hearing disputing the Commission's expert opinion that the dollar amount used by the Commission for the recreational value of the Monterey beach was a reasonable one – an opinion that took into account the differences between beaches in different areas of California and the specific characteristics of the Monterey beach at issue. Pet. App. A-42-43. As detailed in the Court of Appeal's opinion, there is extensive record evidence to support that the fee the Commission imposed is roughly proportional to the public impact of the seawall, and there is no record evidence to contravene that conclusion. *Id.* at A-37-44.

This case is also a poor vehicle for review because the question presented is based on a series of misstatements of the facts in this case. First, there is nothing in the record to support the assertion in the question presented that the fee imposed "grossly exceeds" the market value of one acre of beach property in the vicinity of the seawall. In its final decision the Commission noted the variability of beach front land values in the Monterey area, ranging from

$7 million per acre for beach front property in Aptos to $250,000 per acre for beach front saltwater marsh property near Moss Landing. AR 11:2268. The Commission's only statement regarding the market value of beach property near the seawall project was that an acre of such property would cost much more than $1 million. AR 11:2274. Petitioner is therefore incorrect in asking this Court to assume that the fee imposed – $5.3 million reduced to a present value of $2.1 million – grossly exceeds the market value of beach property in the vicinity of the seawall.

Second, petitioner's question states that the Commission determined the amount of the fee by a method expressly adopted to generate an arbitrarily predetermined amount of revenue. As set forth in the opinion below, the method the Commission used to calculate the fee is described at length in the prehearing staff report, including the amount of the fee. Pet. App. A-54-58. There is no record evidence to support petitioner's contention that the method used to calculate the fee was expressly adopted to generate an "arbitrarily predetermined" amount of revenue.

Finally, the question presented incorrectly states that the fee will be used to "finance undetermined recreational opportunities to serve an undetermined population at an undetermined place and time." In fact, the Commission's permit decision states that the fee "is to purchase beach front/dune property for public recreational use in the southern Monterey Bay area . . . within ten years of the fee being deposited into a Monterey Peninsula Regional Parks District

account." Pet. App. A-15; AR 13:2241. Characterizing this specific permit condition as allowing use of the mitigation fee for "undetermined recreational opportunities" at an "undetermined place and time" is a misstatement of the facts in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: January 12, 2009

Respectfully submitted,

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